IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 678 of 2001
And
SPECIAL CIVIL APPLICATION No. 1910 of 2001

For Approval and Signature:

HON'BLE MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PRIYA BLUE INDUSTRIES LTD & Anr.

Versus

DEBT RECOVERY APPELLATE TRIBUNAL & Ors.

Appearance:

1. Special Civil Application No. 678 of 2001
MR PC KAVINA for Petitioner
Respondents No. 1 & 3 :: Served
MR SS PANESAR for Respondent No. 2

2. Special Civil Application No. 1910 of 2001
MR MIHIR THAKORE, Senior Advocate with
MS MINI M NAIR for Petitioner
Respondent No. 1 :: Served
MR SS PANESAR for Respondent No. 2
MR PC KAVINA for Respondent no. 3

CORAM : HON'BLE MISS JUSTICE R.M.DOSHIT
Date of decision: 06/05/2004

ORAL JUDGEMENT

Heard the learned advocates.

The learned advocates agree that the matters be heard and finally disposed of.

Both these petitions arise from the judgment and order dated 30th November, 2000 passed by the Debt Recovery Appellate Tribunal, Mumbai [hereinafter referred to as, "the Appellate Tribunal"] in Appeal No. 119 of 2000. Both these petitions are, therefore, decided by this common judgment.

Leave to replace Annexure-8 [page 278] in Special Civil Application No. 678 of 2001 by a photo copy.

The petitioner in Special Civil Application No. 678 of 2001 is one Priya Blue Industries Limited [hereinafter referred to as, `the Buyer']. The petitioner in Special Civil Application No. 1910 of 2001 is the Dena Bank, a nationalized bank [hereinafter referred to as, `the Issuing Bank']. The contesting respondent in both these petitions is the State Bank of India, a Corporation constituted under the State Bank of India Act, 1955 [hereinafter referred to as, `the Negotiating Bank']. The matter at dispute is the letter of credit issued by the Issuing Bank in its Khar Ghate Branch, Bhavnagar at the instance of the Buyer and discounted by the Negotiating Bank in its branch at New York, U.S.A.

Under the memorandum of agreement dated 24th February, 1998, the Buyer had agreed to purchase a Vessel `M.V. DALNIY VOSTOK' for demolition from one-M/s. Global Marketing Systems Inc., United States of America [hereinafter referred to as, `the Seller'] for the sum of US $ 1,832,493.50. Under the said agreement, the Buyer agreed to pay the purchase price by means of an irrevocable letter of credit acceptable to the Seller. Pursuant to the application made by the Buyer, on 2nd March, 1998, the Issuing Bank opened a letter of credit [hereinafter referred to as, "the Letter of Credit"] in favour of the Seller through the Negotiating Bank. On

presentation of the required documents by the Seller, the Negotiating Bank made payment to the Seller as advance. However, the Issuing Bank refused to accept the documents and to honour the Letter of Credit. Feeling aggrieved, the Negotiating Bank filed Original Application No. 343 of 1998 in the Debts Recovery Tribunal, Ahmedabad against the Buyer and the Issuing Bank. The said application came to be dismissed by the judgment and order dated 20th July, 2000. Feeling aggrieved, the Negotiating Bank preferred Appeal No. 119 of 2000 before the Appellate Tribunal which came to be allowed by the judgment and order dated 30th November, 2000. Therefore, the present petitions.

Learned advocate Mr. Percy Kavina has appeared for the Buyer [petitioner in Special Civil Application No. 678 of 2001]. He has read over the judgment and the relevant documents. He has submitted that there was no privity of contract between the Negotiating Bank and the Buyer. The Negotiating Bank, therefore, cannot have a claim against the Buyer. He has submitted that the Issuing Bank was required to ascertain that the documents submitted by the Seller were in accordance with the terms of the Letter of Credit. In the present case, the documents submitted by the Seller were not in accordance with the terms of the Letter of Credit. The Issuing Bank had informed the Negotiating Bank that the said documents were not acceptable to the Issuing Bank. Nevertheless, the Negotiating Bank proceeded further and made the payment to the Seller. He has pointed out how the documents submitted by the Seller differed from the ones required under the terms of the Letter of Credit. He has submitted that the Issuing Bank was justified in refusing to honour the said Letter of Credit. He has also submitted that if the Negotiating Bank had any claim, it could be against the Seller and not against either the Issuing Bank or the Buyer. Mr. Kavina has submitted that the Appellate Tribunal has erred in invoking Section 70 of the Contract Act and in allowing the claim made by the Negotiating Bank. In support of his contentions, Mr. Kavina has relied upon the judgment of the House of Lords in the matter of Equitable Trust Company of New York vs. Dawson Partners, Limited, 27, Lloyd's List Law Reports {page-52} with Speech of Viscount Sumner; judgments of the Hon'ble Supreme Court in the matters of M/s. Tarapore & Company, Madras Vs. M/s. V/O Tractoroexport Moscow & Anr., [AIR 1970 SC 891]; of United Commercial Bank v. Bank of India & Ors. [(1981) 2 SCC 766]; of U.P Cooperative Federation Limited vs. Singh Consultants & Engineers (P) Limited [(1988) 1 SCC 174]; of I.T.C Limited vs. Debts Recovery Appellate Tribunal & Ors.

[(1998) 2 SCC 70]; of Federal Bank Limited vs. V.M Jog Engineering Limited & Ors. [(2001) 1 SCC 663]; of Hira Lall And Sons & Ors. vs. Lakshmi Commercial Bank [(2002) 6 SCC 389]; of State of West Bengal vs. M/s. B.K Mondal & Sons [AIR 1962 SC 779]; of Aires Advertising Bureau v. C.T Devaraj (Dead) by L.Rs.,[AIR 1995 SC 2251]; and of Kerala State Handloom Development Corporation v. State Bank of India, Cannanore [AIR 2001 Kerala 175]. He has also relied upon Uniform Customs & Practice for Documentary Credits No.500 [UCPDC] applicable to the case.

Learned advocate Mr. Thakore has appeared for the Issuing Bank [petitioner in Special Civil Application No. 1910 of 2001]. He has submitted that the credit contract under a letter of credit is distinct from the contract between the buyer and the seller. It is an independent contract between the two banks. Under a letter of credit an opening bank guarantees the beneficiary payment of a specified sum on the beneficiary complying with the conditions of the letter of credit. He too has relied upon the above referred judgments and has submitted that the Negotiating Bank failed to ensure that the documents submitted by the Seller were in accordance with the terms of the Letter of Credit. The said documents were not in conformity with the terms of the Letter of Credit. The Issuing Bank had pointed out the discrepancies to the Negotiating Bank. The Issuing Bank was justified in refusing to accept such documents and to honour the Letter of Credit issued by it.

In answer to the aforesaid contentions, learned advocate Mr. Panesar has not disputed the legal position culled from the aforesaid judgments. He, however, has relied upon the pleadings. He has submitted that it was the categorical case of the Negotiating Bank that, "..it is also pertinent to note that the initial certificate which was presented by the applicant Bank was as per the draft approved by the respondents. Therefore, neither of the respondents can now contain that certificate was not in accordance with the terms of LC." He has submitted that this particular plea taken by the Negotiating Bank has not been denied by the Issuing Bank. The Issuing Bank and the Buyer having approved the draft of the certificate, they are now estopped from contending that the certificate in question was not in the terms of the Letter of Credit. He has also relied upon the communication dated 16th March, 1998 [page 280 in Special Civil Application No. 678 of 2001]. Under the said communication, the Issuing Bank had informed the Negotiating Bank, inter alia, that, "....Copy of

Certificate from Registration Authority is not as per documents required for negotiation of L.C Clause No.6." At the foot, it was stated that, "..The discrepancy has been informed to buyer/applicant and if the party accepts the documents then he shall collect and remit on due date. Meanwhile we hold the documents at your risk and responsibility pending your compliance." Relying upon these particular lines, learned advocate Mr. Panesar has submitted that inspite of the alleged discrepancy, the Issuing Bank did agree to hold the document meaning thereby the Issuing Bank waived its right to raise dispute and thereby gave opportunity to the Negotiating Bank to comply with the condition of the Letter of Credit. Thus, the Issuing Bank waived its right to raise the dispute with respect to the compliance with the terms of the Letter of Credit. He has also submitted that on perusal of the document in question, it is evident that the certificate submitted by the Seller was in accordance with the terms of the Letter of Credit. There being no discrepancy, as alleged, the refusal of the Issuing Bank to honour the Letter of Credit was unjustified. The Issuing Bank was liable to accept the documents; to honour the Letter of Credit and to make payment to the Negotiating Bank. At last, he has submitted that the said refusal was inequitable in as much as the Buyer did receive the delivery of the vessel purchased by it.

The Uniform Customs & Practice for Documentary Credits No.500 [hereinafter referred to as, "UCPDC"] is a compilation of Articles regulating the documentary credits published by the International Chamber of Commerce. It is universally accepted and is made applicable to the contracting parties by agreement. The articles relevant for the purpose of the present case are Articles 2, 3, 4, 7, 9, 10, 13, 14 and 15. The provisions relevant are,

Article 2-Meaning of Credit

"..For the purpose of these articles, the expressions 'Documentary Credit(s)' and 'Standby Letter(s) of Credit' [hereinafter referred to as, 'Credit(s)' means any arrangement, however named or described whereby a bank [the 'Issuing Bank'] acting at the request and on the instructions of a customer ('the Applicant') or on its own behalf.

(i) is to make a payment to or to the order of a third party (the "Beneficiary"), or is to accept and pay bills of exchange (Draft(s)) drawn

by the Beneficiary.

(ii) authorises another bank to effect such payment, or to accept and pay such bills of exchange (Draft(s)), or

(iii) authorises another bank to negotiate against stipulated document(s) provided that the terms and conditions are complied with."

Article 3-Credit v. Contracts

(a) Credits' by their nature, are separate transactions from the sales or other contract(s) on which they may be based and banks are in no way concerned with or bound by such contract(s), even if any reference whatsoever to such contract(s) included in the credit. Consequently, the undertaking of a bank to pay, accept and pay Draft(s) or negotiate and/or to fulfil any other obligation under the Credit, is not subject to claims or defences by the Applicant resulting from his relationship with the issuing Bank or the beneficiary.

Article 4-Documents v. Goods/Services/Performance -

In credit operations all parties concerned deal with documents, and not with goods, services and/or other performances to which the documents may relate.

Article 7-Advising Bank's Liability

A Credit may be advised to a Beneficiary through another bank (the 'Advising Bank') without engaging on the part of the Advising Bank, but that bank, if it elects to advise the Credit, shall take reasonable care to check the apparent authenticity of the credit which it advises. If the bank elects not to advise the credit, it must so inform the issuing bank without delay.

Article 9-Liability of Issuing and Confirming Banks

(a) An irrevocable credit constitutes a definite undertaking of the issuing bank, provided that the stipulated documents are presented to the Nominated Bank and/or to the Issuing Bank and that the terms and conditions of credit are complied with.

(b) A confirmation of an irrevocable Credit by another bank (the "Confirming Bank") upon the authorization or request of the issuing bank constitutes a definite undertaking of the Confirming Bank, in

addition to that of the issuing bank, provided that the stipulated documents are presented to the Confirming Bank or to any other Nominated Bank and that the terms and conditions of the Credit are complied with."

Article 13-Standard for Examination of Documents

(a) Banks must examine all documents Stipulated in the credit with reasonable care to ascertain whether they appear on their face to be in compliance with the terms and conditions of the Credit. Compliance of the stipulated documents on their face with the terms and conditions of the Credit shall be determined by International Standard banking practice as reflected in these Articles. Documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in compliance with the terms and conditions of the credit.

Article 14-Discrepant Document and Notice

(b) Upon receipt of the documents the Issuing Bank and/or Confirming Bank, if any, or a Nominated Bank acting on their behalf, must determine on the basis of the documents alone whether or not they appear on their face to be in compliance with the terms and conditions of the credit. If the documents appear on their face not to be in compliance with the terms and conditions of the credit. If the documents appear on their face not to be in compliance with the terms and conditions of the credit, such banks may refuse to take up the documents."

(c) xx xx xx xx

(d) xx xx xx

(ii) Such notice must state all discrepancies in respect of which the bank refuses the documents and must also state whether it is holding the documents at the disposal of, or is returning them to, the presenter.

Article 15-Disclaimer on Effectiveness of Documents

Banks assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document(s), or for the general and/or particular conditions stipulated in the documents or superimposed thereon; nor do they assume

any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods represented by any document(s), or for the good faith or acts and/or omissions, solvency, performance or standing of the consignors, the carriers, the forwarders, the consignees or the insurers of the goods, or any other person whomsoever."

I need not deal with the above referred judgments relied upon by Mr. Kavina. The principles enunciated in the aforesaid judgments are the same as are incorporated in the aforesaid UCPDC i.e. the credit contract under a letter of credit is independent of the agreement between the seller and the buyer. Whether the seller or the buyer has performed his part of contract; whether the goods are dispatched or not; whether the goods are received or not; whether the goods meet the specification or not; are not relevant in the matter of credit contract. What is relevant is the documents presented by the beneficiary. Such documents shall conform with the terms of the credit contract. As said by Viscount Sumner in his Lordship's speech in the matter of Equitable Trust Company of New York [Supra], "..the accepting bank can only claim indemnity if the conditions on which it is authorized to accept are in the matter of the accompanying documents strictly observed. There is no room for documents which are almost the same, or which will do just as well. ....The bank's branch abroad, which knows nothing officially of the details of the transaction thus finance, cannot take upon itself to decide what will do well enough and what will not. If it does as it is told, it is safe; if it departs from the conditions laid down, it acts at its own risk." It is the duty of the negotiating bank to take all possible care and caution to ensure that the documents presented by the beneficiary {the seller} are in conformity with the terms of the letter of credit. No deviation from the terms of the letter of credit is permissible. As held by the Supreme Court in the matter of United Commercial Bank [Supra], "the Banker knows only the Letter of Credit which is the only authority to act, and the documents which are presented under it. If these documents conform to the Letter of Credit, he is bound to pay. If not, he is equally not bound to pay."

As I shall presently discuss the documents presented by the Seller, particularly the "No Encumbrance Certificate" issued by the port of registration was not in conformity with Clause 6 of the terms of the Letter of

Credit. The Issuing Bank had in accordance with the UCPDC conveyed its refusal to accept the said documents with promptitude and had stated the discrepancies in respect of which it refused to accept the documents. The Negotiating Bank also had made the payment to the Seller as advance and was aware that it had a recourse against the Seller.

The Letter of Credit was issued on 2nd March, 1998 on application made by the Buyer for the benefit of the Seller. The relevant Clause No.6 required, "..A copy of certificate from Registration Authority of the Vessel's present port of registry, stating that their is not liens, mortgages, debts, taxes or other encumbrances on the vessel 'DALNIY VOSTOK'. Such certificate should be dated not prior to 7 days from the date of physical delivery of the vessel 'DALNIY VOSTOK'. Amongst other conditions, the last date of physical delivery of the vessel 'M.V. DALNIY VOSTOK' was specified as 98-03-04 [i.e. 4th March, 1998]; whereas the negotiation of documents under the Letter of Credit not later than 98-03-19 [i.e. 19th March, 1998] at New York, U.S.A.

It transpires that in compliance with the terms of Letter of Credit, the Seller submitted a Non-Encumbrance Certificate dated 23rd February, 1998 which read as under:-

> "This is to confirm that the vessel 'Dalniy Vostok' registered in stateship list of Vladnivostok Sea Fishing Port under number 58 on April, 22 1963 is a property of JSC HC "Dalmoreproduct"."
>
> The captain service of Vladivostok Sea fishing Port has no information about the above vessel having any liens, mortgages, debts, Taxes or other encumbrances on the vessel whatsoever."

The documents submitted/presented by the Seller were forwarded to the Issuing Bank under communication dated 3rd March, 1998. On receipt of the said documents, the Issuing Bank responded by communication dated 16th March, 1998. The Negotiating Bank was informed, inter alia, that two discrepancies were found in the documents submitted under the Letter of Credit. One of the discrepancies referred to was complied with later which is not the subject matter of dispute in the present litigation. The condition which is relevant was, 'copy

of certificate from Registration Authority of the Vessel's present port of registry, stating that their is not liens, mortgages, debts, taxes or other encumbrances on the vessel 'DALNIY VOSTOK' [Clause No.6]. The Negotiating Bank was further informed that, "..this notice constitute our clear refusal of the documents and it is given under Article 16 OD U.C.P 400 OR Aritcle 14 of U.C.P 500. As applicable the documents are considered on collection basis only." Inspite of the aforesaid communication, the Negotiating Bank by communication dated 16th March, 1998 maintained that, "..Copy of certificate from registration authority is strictly as per L.C Clause No.6." This communication was answered on 21st March, 1998. The Issuing Bank expressed its disagreement that the certificate of registration authority was strictly as per the Letter of Credit Clause No.6. The Issuing Bank informed that, "..we do not agree that copy of certificate from registration authority is strictly as per L.C Clause No.6. Certificate should clearly state that there is no liens, mortgages, debts, taxes or other encumbrances on the vessel 'DALNIY VOSTOK'. Whereas, certificate submitted by you state that the Captain on service of Valdivostok Sea Fishing Port has no information about the above vessel having liens, mortgages, debts, taxes or other encumbrances on the vessel whatsoever." Once again, the clear refusal to accept the document was intimated. Thereafter, No Encumbrance Certificate No. 29/59 dated 26th March, 1998 issued in the terms required was sent by the Negotiating Bank. However, the same was received after the due date. Mr. Kavina has here drawn my attention to the communication dated 9th April, 1998 received from the Captain, Sea Fishing Port, Port-Valdi intimating the Buyer that the said authority had not issued No Encumbrance certificates No. 11/38 dated 23rd February, 1998 and 29/59 dated 26th March, 1998 with respect to the vessel Dalniy Vostok. Thus, the "No Encumbrance Certificate" in the required terms was received by the Issuing Bank not only after the due date but was ultimately found to be a forged document. After refusal of the Issuing Bank to accept the said document and to make payment on the said Letter of Credit, the Issuing Bank also informed the Negotiating Bank vide letter dated 26th March, 1998 that the Buyer had refused to accept the documents submitted by the Seller. In view of the non-acceptance of the said document, the Negotiating Bank advised the Seller that it should take up the matter suitably with the Buyer to resolve the issue to obviate the necessity of any claim for refund. Such refund alongwith the interest was also demanded on 22nd May, 1998 which of course was denied by the Seller. The

Seller was immediately notified/ intimated by the Negotiating Bank that, "..please also note that since we had only granted advance against your documents under the L.C which was not confirmed by us, we have full recourse against you." It was further stated that, "..We once again repeat that once the acceptance of the opening bank is received we are willing to rediscount the bill till its due date." The Negotiating Bank having gone thus far with respect to its claim against the Seller did not pursue the matter further and instead sued the Buyer and the Issuing Bank for recovery of money under the Letter of Credit in the aforesaid Original Application No. 343 of 1998.

The learned Tribunal dismissed the said Application against the Buyer. With respect to the Issuing Bank, it was directed that the applicant-Bank [Negotiating Bank] and the Issuing Bank or any of them may refer the dispute before the constituted Committee under the Cabinet Secretary of India.

In Appeal before the Appellate Tribunal, the negotiating Bank conceded that it had no privity of contract with the Buyer. The negotiating Bank, however, based its claim against the Buyer under the provisions of the Sale of Goods Act, the Negotiable Instruments Act and Section 70 of the Contract Act. The Appellate Tribunal negatived the claim based on the Sale of Goods Act and the Negotiable Instruments Act. However, upheld the claim made under Section 70 of the Contract Act.

As to the claim against the Issuing Bank, the Appellate Tribunal was of the opinion that the No Encumbrance Certificate dated 23rd February, 1998 submitted by the Seller was in terms of the requirement under the Letter of Credit. The said certificate in substance was the same as was required. I am unable to agree with this finding recorded by the Appellate Tribunal. Under the terms of the Letter of Credit, a Certificate of the registering authority having specific knowledge of absence of any liens, mortgages, debts or other encumbrances on the part of the registering authority was called for. Whereas the certificate dated 23rd February, 1998 submitted by the Seller certified the absence of knowledge of any existing liens, mortgages and other encumbrances, etc. Absence of knowledge of subsisting encumbrances cannot be equated with the specific knowledge of absence of such encumbrances. There is no way to hold that the Certificate dated 23rd February, 1998 submitted by the Seller was in terms of the requirement of the Letter of Credit. I am,

therefore, of the view that the Issuing Bank was wholly justified in holding that No Encumbrance Certificate dated 23rd February, 1998 was not in conformity with Clause No.6 of the Letter of Credit and in not accepting the same. The latter No Encumbrance Certificate admittedly was received after the due date. In any view of the matter, the same was reported to be a forged document. Hence, I am of the opinion that the Issuing Bank was within its right in refusing to honour the Letter of Credit.

It is also true that the Letter of Credit was an independent contract between the two Banks i.e., the Issuing Bank and the Negotiating Bank. The Negotiating Bank, therefore, cannot have a claim against the Buyer. Learned advocate Mr. Kavina is right in contending that there was no privity of contract between the Buyer and the Negotiating Bank. The Negotiating Bank, therefore, cannot have a claim against the Buyer. The Negotiating Bank had indeed raised claim against the Seller which it decided not to pursue.

As to the contention raised by Mr. Panesar, with respect to approval of the draft by the Issuing Bank, I must say that except the bare plea, there is no supporting material on record. On the face of the correspondence aforesaid, it cannot be believed that the draft was approved by the Issuing Bank, as contended. Moreover, the Buyer has specifically denied the said averment in its pleading.

The contention that the Issuing Bank had waived its right to raise dispute with respect to the compliance with the terms of the Letter of Credit is misconceived. The above referred communication dated 16th March, 1998 was in consonance with the UCPDC, particularly Article 14 thereof. The same does not amount to waiver as contended by Mr. Panesar.

What has essentially weighed with the Appellate Tribunal is the fact that the Buyer did receive the delivery of the Vessel. The Buyer having received the delivery of the goods had refused to pay for the same. In the opinion of the Appellate Tribunal, the equity required that the Buyer should pay for the goods received by it. In the circumstances, the Appellate Tribunal has invoked Section 70 of the Contract Act and has held that, "..the buyer is under an obligation to pay for the goods received by it." Section 70 of the Contract Act imposes an obligation on a person enjoying benefit of the lawful act done or thing delivered by the other, not intended to

be gratuitous to make compensation for such benefit or to restore the thing so done or delivered. On the facts of the present case, the above referred Section 70 of the Act could not be invoked. The said Section 70 applies to a relation resembling a contract. In the present case, the entire transaction was based on an agreement culminating into a complete contract. The rights and liabilities of the parties were required to be determined on the basis of the terms of the said contract alone. In any view of the matter, if any party had a right to sue the Buyer for compensation under Section 70 of the Contract Act, it could be the Seller. The Negotiating Bank can, by no stretch of imagination, have claim against the Buyer under the said Section 70.

In view of the above discussion, both these petitions shall succeed. The impugned judgment and order dated 30th November, 2000 passed by the Debts Recovery Appellate Tribunal, Mumbai in Appeal No. 119 of 2000 is quashed and set-aside. The Original Application No. 343 of 1998 filed by the respondent State Bank of India stands dismissed. Both these petitions are allowed with costs.

Registry shall maintain copy of this judgment in each petition.

{Miss R.M Doshit, J.}

Prakash*